SUPPORTING BRIEF.

I.

Index to brief is included in index to petition, *supra*.

II.

The Opinion of the Court of Appeals.

This opinion was filed August 12, 1942, but is not yet reported (R. 90).

III.

Grounds On Which Supreme Court Jurisdiction Is Invoked.

This application is made upon authority of section 240-a of the Judicial Code, as amended by the Act of Congress of February 13, 1925, 43 Stat. 936 and section 5-b of Rule 38 of this Court; and upon the ground that petitioner has been deprived of the right of jury trial as guaranteed by the Seventh Amendment.

IV.

Statement of Case.

This is an action for damages based upon two grounds, (1) conversion of personalty and (2) trespass to realty. The grounds are not separately stated, but are jumbled together in one complaint (R. 1 & 25). No motion was made to require a separate statement or to eliminate either issue from the case (R. 25). After all the testimony was in, defendant-respondent moved for the direction of the verdict on the whole case (R. 18) and then for the direction of the verdict as to all punitive damages (R. 20); but did not make any motion or ask any peremptory instructions wherein the case for trespass was distinguished from the

case for conversion. The trial Judge reserved his decision on these two motions (R. 24 & 25) (though the Court of Appeals holds that he then refused the same, the holding being based on matter appearing at R. 20, which is corrected by the trial Judge at R. 25 & 69) and the jury returned a general verdict for actual damages and a general verdict for punitive damages (R. 25). These motions were later fully argued and refused. No motion for a new trial was made by either party (R. 25).

The Court of Appeals definitely holds that petitioner is entitled to actual damages both as to conversion and as to trespass, R-96, and does not find error of law in the trial Judge's holding that petitioner is entitled to punitive damages as to the conversion; but, after weighing the evidence *pro* and *con*, which does exist, holds that the respondent was not guilty of wilfulness entitling petitioner to punitive damages in the case for trespass, and thereupon proceeds to merge petitioner's right to punitive damages for the conversion into its claim for punitive damages for the trespass, holding that its "insistence at this time on its rights with respect to the equipment is merely a part and incident of its larger claim as to which no punitive damages are recoverable", and thereupon holds that the judgment cannot stand since it includes an allowance for punitive damages. R-99.

There is in the record evidence of wilfulness in the trespass, not discussed by the Court of Appeals, in the form of a statement attributed by petitioner's witness H. O. Hanna to respondent's District Manager Alridge, when warned over the telephone that action would be brought against respondent if it took possession of this realty, that: "You will have trouble when it comes to the testimony because you don't know that I am Mr. Alridge." R-88.

V

Specification of Errors.

1. The decision herein reverses the judgment of the District Court in the *absence of error in law* on the part of the District Judge, so that such reversal constitutes a re-examination of facts tried by a jury, other than according to the rules of the common law, in violation of the Seventh Amendment to the Constitution, and in conflict with the procedural requirements outlined by this Court in *The Hartford Life & Annuity Ins. Co.* v. *Unsell*, 144 U. S. 439; in that, under the rules of the common law and under that decision, a new trial can be granted only for *error in law.*

2. The decision herein is in violation of Act of Congress, 18 Stat. 318, 28 U. S. C. A. 879, providing that there shall be no reversal in a Court of Appeals for any *error of fact,* and in conflict with *McCaughn* v. *Real Estate Land Title & Trust Co.*, 297 U. S. 606, because there is evidence in this case of wilfulness in respondent's trespass to the realty as held by the District Judge.

VI

ARGUMENT.

Specification No. 1.

The only ruling of the District Judge as to punitive damages was his refusal to direct the verdict for defendant-respondent, he finding that there was evidence of wilfulness both as to the trespass and as to the conversion, R-75. And no motion or ruling was made in connection with eliminating punitive damages as to the trespass. R-67.

The Court of Appeals holds that there is no evidence of wilfulness as to the trespass, R-98, but does not reverse the District Judge in his holding that there is evidence of wil-

fulness in the conversion, R-99, so that up to this point there is no *error in law* on the part of the District Judge in not directing the verdict as to punitive damages, because there is evidence of wilfulness in the conversion; but the Court of Appeals then, in considering punitive damages as to the conversion, incomprehensibly holds: R-99.

> "Colonial's insistence at this time on its rights with respect to its equipment is merely a part and incident of its larger claim as to which no punitive damages are recoverable."

and thereupon reverses the judgment and orders a new trial.

However, there is still left in the record the evidence of wilfulness in the conversion, which prevents the Court of Appeals holding without error in law and fact, that the District Judge was in error in law in refusing to direct the verdict as to all punitive damages—unless it can be done by this novel means of merger of petitioner's rights, or disregard of what is said to be its lesser rights.

Forgetting the distinction between conversion and trespass, the verdict could not be directed as to punitive damages for conversion of a horse and buggy if there is evidence of wilfulness in the conversion of either one. In the instant case, the Court of Appeals correctly holds that the verdict for actual damages $666.00 seems to have been made up of the value of the equipment, $465.00, plus an additional sum for damages in the loss of the business of the station, R-91, so that the Court of Appeals is merging the larger into the smaller claim.

The result is that a matter once tried by a jury is being ordered re-examined other than according to the rules of the common law, and also upon reasoning that would convert the Court of Appeals into an arbitrary arbitrator.

The Seventh Amendment provides " • • • and no fact

tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law;" and those rules did not permit an appellate Court to reverse a judgment at law and order a new trial, *except upon error in law. Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364. And in the *Hartford Life & Annuity Ins. Co.*, 144 U. S. 439, it is held:

> "The only ground for serious doubt in the case is, whether the evidence was sufficient in any view of it to sustain the theory. * * * But we need not consider the case in those aspects; for the defendant assumed that it would be submitted to the jury, and asked instructions touching the several points on which it relied. It did not ask a peremptory instruction for a verdict in its behalf. It cannot, therefore, be ground of reversal that the issues of fact were submitted to the jury. As *no error of law* was committed to the prejudice of the defendant, the judgment must be affirmed."

In the instant case, defendant-respondent did not ask a peremptory instruction as to punitive damages for the trespass as distinguished from the conversion.

Specification No. 2.

The District Judge, under the responsibility for the justice of a judgment and with the advantage of studying the witnesses and the evidence as it comes into the record, was of opinion that there is evidence of wilfulness in the trespass, R-75-78; but the Court of Appeals, from its study of the record, finds that there is no such evidence, R-98; that Court, in its search of the record for evidence of an intentional wrong—mental attitude—inadvertently overlooking the testimony of petitioner's witness Hanna, R-88, that when he warned defendant-respondent's District Manager Alridge over the telephone that his company would be

sued if it took this station, Mr. Alridge replied: "You will have trouble when it comes to the testimony because you don't know that I am Mr. Alridge."

And again, the deduction made by the Court of Appeals from all of the evidence that it considered that the investigation made by respondent before taking possession of the realty showed the absence of wilfulness is only one of the possible reasonable deductions therefrom—the other to the contrary being made by an eminent trial judge. And in view of Alridge's testimony above quoted, it is entirely reasonable to say that this investigation was only a search for evidence and not for petitioner's rights.

Respectfully submitted,

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